

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>BRETT MARKS</b>	:	DETERMINATION DTA NO. 823425
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 2006 through May 31, 2008.	:	

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Petitioner, Brett Marks, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2006 through May 31, 2008.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated June 14, 2010 seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of John E. Matthews, dated June 14, 2010, and annexed exhibits supporting the motion. Petitioner did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination began on July 14, 2010, the due date for petitioner's response. After due consideration of the affidavits and documents submitted, Timothy Alston, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of certain notices of determination.

***FINDINGS OF FACT***

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of eight notices of determination.

2. Seven of the notices are dated September 22, 2008 and are addressed to petitioner, Brett Marks, at 5 Carriage Hill Rd., White Plains, NY 10604-1525. These notices assesses assess additional tax due, plus penalty and interest, for the collective period June 1, 2006 through February 29, 2008. The notices bear consecutive assessment identification numbers L-030666384-90. The seven corresponding mailing cover sheets (*see* Finding of Fact 10 and 13) bear petitioner's name and the above-noted address and a certified mail control number assigned to each respective notice.

3. The remaining notice is dated December 22, 2008. This notice is also addressed to petitioner at the above-noted address. It assesses tax due, plus penalty and interest, for the period March 1, 2008 though May 31, 2008 and bears assessment identification number L-031330794. A corresponding mailing cover sheet bears petitioner's name and the address as noted and a certified mail control number assigned to that notice.

4. On December 15, 2009, petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the eight notices of determination described above.

5. On December 24, 2009, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the eight subject notices of Determination was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was [sic] issued on

September 22, 2008 and December 22, 2008, but the request was not received until December 15, 2009, or in excess of 90 days, the request is late filed.

6. To show proof of proper mailing of the notices dated September 22, 2008, the Division provided the following: (i) an affidavit, dated June 9, 2010, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated June 9, 2010, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); and (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked September 22, 2008.

7. To show proof of proper mailing of the Notice of Determination dated December 22, 2008, the Division provided the following: (i) an affidavit, dated June 9, 2010, of Mr. VanDerZee; (ii) an affidavit, dated June 9, 2010, of Ms. Sears; (iii) the CMR postmarked December 22, 2008; (iv) an affidavit, dated June 9, 2010, of Heidi Corina, a legal assistant in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (v) a Request for Delivery Information/Return Receipt after Mailing (PS Form 3811-A), the United States Postal Service response to such request dated March 4, 2010, and a copy of the envelope in which the December 22, 2008 Notice of Determination was mailed.

8. The affidavits of Patricia Finn Sears each set forth the Division's general practice and procedure for processing statutory notices.

9. The notices are predated with the anticipated date of mailing. With respect to the notices dated September 22, 2008, each page of the 42-page CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first page to "9/22/08," to reflect the

actual mailing date. With respect to the December 22, 2008 notice each page of the 40-page CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. The date on the first page of this CMR was also manually changed in accordance with the Division's general procedure to "12/22/08," to reflect the actual mailing date.

10. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The assessment numbers are listed under the heading entitled "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street and PO Address."

11. Pages 8 and 9 of the September 22, 2007 CMR contain information on the notices bearing that date. The control numbers, assessment identification numbers and petitioner's address as listed on the CMR all correspond to the information on the mailing cover sheets and the September 22, 2008 notices of determination.

12. Page 9 of the December 22, 2008 CMR contains information on the notice bearing that date. The control numbers, assessment identification numbers and petitioner's address as listed on the CMR all correspond to the information on the mailing cover sheets and the December 22, 2008 Notice of Determination.

13. The VanDerZee affidavits describe the general operations and procedures of the Division's Mail Processing Center. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is preceded by a mailing cover sheet. A staff member retrieves the notices and operates a machine that puts each statutory notice and mailing

cover sheet into a windowed envelope. The staff member then weighs, seals and places postage on each envelope. The first and last pieces of mail listed on the CMR are checked against the information listed on the CMR. A clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking the envelopes against the information contained on the CMR. A member of the Center then delivers the envelopes and the CMR to one of the various U.S. Postal Service (USPS) branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR indicating receipt by the post office. The Center further requests that the USPS either circle the number of pieces of mail received or indicate the total number of pieces received by writing the number on the CMR.

14. A review of the CMR submitted by the Division in respect of the September 22, 2008 notices confirms that a USPS employee affixed a dated postmark and initials on each page. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 453, which has been circled. The USPS postmarks are from the Colonie Center branch and each bears the date September 22, 2008. The affixation of the postmarks, the postal service employee's initials, and the circling of the number 453 indicating that all such pieces were received, confirm that the seven notices of determination dated September 22, 2008 were received by the USPS on that date.

15. A review of the CMR submitted by the Division in respect of the December 22, 2008 Notice of Determination confirms that a USPS employee affixed a dated postmark and initials on each page. The USPS postmarks are from the Colonie Center branch and each bears the date December 22, 2008. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 438. This number has not been circled. The affixation of the postmarks and

the postal service employee's initials confirm that the Notice of Determination dated December 22, 2008 were received by the USPS on that date.

16. The affidavit of Heidi Corina describes the Division's request to the Postal Service for delivery information on the Notice of Determination dated December 22, 2008. Specifically, the PS Form 3811-A requests delivery information with respect to an article of mail bearing the certified control number associated with the December 22, 2008 notice. The USPS response dated March 4, 2010 indicates that such article was returned to the Division on January 2, 2009. A copy of the envelope in which item was mailed indicates that such item was "refused" on December 24, 2008.

17. Petitioner's 2006 New York resident income tax return, dated July 10, 2008, reports petitioner's address as 5 Carriage Hill Road, West Harrison, NY, 10604. This was the last return filed by petitioner prior to the issuance of the subject notices.

18. Information obtained by the Division from the USPS website indicates that, while West Harrison (the city name on petitioner's tax return) is the actual city name in the 10604 zip code, White Plains (the city name on the subject notices) is an acceptable city name in the 10604 zip code.

### ***CONCLUSIONS OF LAW***

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Petitioner did not respond to the Division's motion; he is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36

NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *Costello Assocs. v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Sears and VanDerZee affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden*, at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170 [1992]).

C. Where, as here, the timeliness of a Request for Conciliation Conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of mailing to petitioner's last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. Here, the Division introduced sufficient proof to establish proper mailing of the statutory notices at issue to petitioner's last known address on the dates claimed. The submitted affidavits and CMRs establish the Division's standard mailing procedure and that, in this case, the procedure was followed (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, petitioner's address on the notices, the corresponding mail cover sheets and the CMRs conforms with the address reported on the last New York sales tax return filed by petitioner prior to the issuance of the subject statutory notices, thereby satisfying the "last known address" requirement in Tax Law § 1138(a)(1). Finally, the Division has established that the December 22, 2008 notice was offered for delivery to petitioner on December 24, 2008. It is concluded, therefore, that the Division properly mailed the September 22, 2008 and December 22, 2008

notices and thus, the statutory 90-day time limit to file either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals commenced on those respective dates (Tax Law § 170[3-a][a]; § 1138[a][1]).

E. Petitioner's Request for Conciliation Conference was filed on December 15, 2009. This date falls well after the 90-day period of limitations for the filing of such a request. Petitioner's request was therefore untimely filed (*see* Tax Law § 1138[a][1], § 170[3-a][b]). The Division of Tax Appeals thus lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2005).

F. Although petitioner did not file a response to the Division's motion for summary determination, in his petition, he asserts the he was "never properly notified of the tax obligations." This contention is rejected. Tax Law § 1147(a)(1) provides that the mailing of a notice of determination "shall be presumptive evidence of the receipt of the same by the person to whom addressed." The mere denial of receipt is insufficient to rebut this presumption (*see Matter of T.J. Gulf v. New York State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97 [1986]; *Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995). Additionally, the presumption of receipt may not be rebutted by a refusal to accept delivery of a statutory notice (*see* Finding of Fact 16; *Matter of American Cars "R" Us, Inc. v. Chu* (147 AD2d 797, 537 NYS2d 672 [1989])).

G. The Division of Taxation's motion for summary determination is granted, and the petition of Brett Marks is dismissed with prejudice.

DATED: Troy, New York  
October 8, 2010

/s/ Timothy Alston  
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ADMINISTRATIVE LAW JUDGE